

STATE OF MICHIGAN
IN THE SUPREME COURT

JAN 2003

TERM

Appeal from the Court of Appeals
Mark J. Cavanagh, Jane E. Markey, Jessica R. Cooper

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court No. 120256

NTUKU ALIAKBAR,

Defendant-Appellant.

Court of Appeals No. 228262
Lower Court No. 99-4574

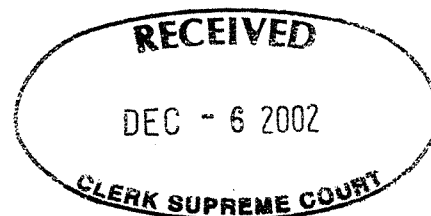
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STATEMENT OF APPELLATE JURISDICTION

The People do not contest jurisdiction for purposes of this brief on appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

A trial court may depart from the sentencing guidelines range for substantial and compelling reasons. The trial court departed from the guidelines range of 15 to 25 months and imposed a minimum sentence of 90 months because defendant's burning of his family's home was part of a pattern of criminal activity against his family that placed them in danger. Did the trial court abuse its discretion in departing from the guidelines range by 65 months?

The People answer: No.

Defendant answers: Yes.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The People accept defendant's statement of facts for purposes of this brief on appeal, subject to the additions noted below and in the People's argument.

This appeal arises out of defendant's conviction, following a bench trial, of the burning of a dwelling house.¹ 31a. On May 24, 2000, the trial court departed from the statutory² sentencing guidelines range of 15 to 25 months³ and sentenced defendant to a term of imprisonment of 7½ to 20 years (90 to 240 months). 40a-41a. Defendant's mother made the following statement regarding her son's crimes against the family at the sentencing hearing:

On April 18, 1998, our van driver's side window was broken out. The windshield was cracked. We continued to drive it until it was fixed on April 25, 1998.

On April 27, 1998, my husband left for work at 4:30 a.m. At 5:00 a.m. I was awakened by my daughter screaming, "Ntuku's breaking our van window again." This time it was worse than before.

The driver's side sliding door and windshield was smashed out. We could not drive it that time. We had it fixed on May 5, 1998.

On May 7, about 5:00 a.m., we saw Ntuku from our window, walking down the street. He ended up in the alley next to our property. He was looking at our back yard (sic), where the van was parked the last time he busted our windows out.

¹ MCL 750.72.

² The statutory sentencing guidelines apply to this case because defendant committed the crime on January 17, 1999. MCL 769.34(2); see also Administrative Order 1998-4.

³ Defendant's prior record level "B" and offense variable level "II" for his Class B offense resulted in a guidelines range of 15 to 25 months. MCL 777.63; see also Sentencing Information Report (54a).

The van was not there. It was parked in the garage. Instead, his father's car was parked in the back yard (sic). My husband took his car out of the garage so that I could park the van in there.

Ntuku then left. We stayed up, looking out, until daylight.

On June 20, 1998 our neighbor told us he saw Ntuku standing on the corner from our house, looking in our back yard (sic). The next morning, June 21, my husband's windshield was broken out.

On November 26, 1998, we were awakened by my daughter screaming, "The house is on fire." My husband and I got up, scared out of our sleep, ran downstairs. Ntuku's sisters, brother and nephew were also awakened and running around.

The window at the foot of the stairway was cracked. A broken bottle laid in the driveway, beneath that window. Some flammable material was burning there.

There was also fire under my husband's tracker-trailer (sic) truck that he had parked in our yard next to the house.

My husband tried putting the fire out under the truck, and in the driveway with water, with the water hose. It did not go out from the water. It burned itself out. We put in a police report.

After the fire, my family said, "Ntuku's trying to kill us." We did not know when he may strike again, or how. My husband bought a fire extinguisher for the house. And it was good he did because that's what saved us.

On January 17, 1999, my family was awakened again with screams of "Fire, fire." Again, "Fire." He was trying to kill us again. We could no longer sleep after that incident that night.

We took shifts. Someone sat at the window on both floors, every night, looking out. My family sat up every night at the window, with the phone in hand. Nearby.

We sat up every night, in fear of our lives, until we got the phone call telling us he had been picked up. That night we went to sleep. We went to bed like people should be able to do, and go to sleep.

He came to our house in darkness to set our house on fire. Not once, but twice. He did the crime. We think he should do the crime, (sic).

37a-39a.

ARGUMENT

A trial court may depart from the sentencing guidelines range for substantial and compelling reasons. The trial court departed from the guidelines range of 15 to 25 months and imposed a minimum sentence of 90 months because defendant's burning of his family's home was part of a pattern of criminal activity against his family that placed them in danger. The trial court properly exercised its discretion to depart from the guidelines range by 65 months.

This case presents this Court with its first opportunity to delineate the scope of appellate review of a departure from the sentencing guidelines established by the Legislature in 1998.⁴ The People contend that, once an appellate court upholds the reasons for departure, the question is whether the departure constitutes an abuse of discretion. As discussed below, the People believe that the trial court did not abuse its discretion in this case, where defendant repeatedly firebombed his family's home, thereby placing their lives in danger.

This brief begins with a summary of argument. Next, the People discuss the history of sentencing in Michigan with a focus on appellate review. Against that backdrop, the People then examine MCL 769.34, which governs departures from the guidelines and includes provisions addressing the scope of appellate review, to discern the standards an appellate court uses when reviewing a sentence outside the guidelines range. In the final section of this brief, the People apply those standards in this case and conclude that the sentence of 90 to 240 months was proper.

A. Summary Of Argument.

Under MCL 769.34(3), a trial court's decision whether to depart from the statutory sentencing guidelines involves a two-step inquiry. First, the court must determine whether

⁴ 1998 PA 317.

substantial and compelling reasons for departing exist. Only reasons that keenly or irresistibly grab one's attention and are of considerable worth in deciding the length of a sentence meet that threshold. Those reasons may be based only on objective and verifiable factors. Second, if the court finds that a substantial and compelling reason is present, it must state its reason(s) for departure on the record and determine the degree of deviation from the guidelines range justified by those reason(s). The court then imposes a sentence that includes that deviation.

In considering an appellate challenge to a trial court's decision to depart, the appellate court reviews the record and reverses if it finds that the trial court did not have a substantial and compelling reason for departing. If the appellate court determines that some of the trial court's reasons were substantial and compelling but others were not, it should remand for resentencing unless the record reveals that the trial court would have imposed the same sentence had it not relied on the erroneous reason. In the event the appellate court upholds the trial court's reasons for departure, it reviews the degree of departure for an abuse of discretion.

In this case, the Court of Appeals correctly affirmed the trial court's decision to depart from the guidelines range of 15 to 25 months and impose a minimum term of imprisonment of 7½ years. The trial court departed because the instant offense was the culmination of a pattern of criminal activity by defendant against his family that placed them in danger. That reason was a substantial and compelling one that justified the 65-month departure selected by the trial court. The factors underlying the court's reason are comparable to factors considered under PRV 5, OV 7, and OV13. If those variables had been scored, the resulting guidelines range would have been 57 to 95 months. The trial court's decision to depart by a period that resulted in a sentence within that range thus was not an abuse of discretion.

B. Construction Of MCL 769.34.

To resolve the issue presented in this case, the Court first must construe the provisions of MCL 769.34 governing departures from the statutory sentencing guidelines and addressing appellate review of sentencing. Questions of statutory construction are questions of law that the Court reviews de novo.⁵ In construing a statute, the Court's "obligation is to examine the statute in an effort to discern and give effect to the legislative intent that may reasonably be inferred from the text of the statute itself."⁶ Where the statutory language is clear and unambiguous, therefore, the Court applies it as written.⁷ "Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished."⁸ With these precepts in mind, the People continue the analysis of MCL 769.34

1. Sentencing In Michigan.

An understanding of the history of appellate review of sentencing in Michigan is necessary to properly construe the provisions of MCL 769.34. The statute did not create review where none existed. In other words, before the statutory sentencing guidelines, appellate courts had occasion to review sentences. Differences between the statutory language and the prior standards of review utilized by this Court thus shed important light on the meaning of MCL 769.34.

⁵ *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

⁶ *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

⁷ *Cruz*, *supra* at 594.

⁸ *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001).

This Court long has acknowledged that the Legislature has the exclusive power to determine the length of imprisonment for a felony.⁹ Recognizing that authority and that the Legislature generally had granted trial courts wide discretion in fashioning a sentence, the Court historically did not review a sentence that fell within the limits set by statute.¹⁰ Consistent with the approach of the federal appellate courts,¹¹ the Court for the most part limited its review to matters of sentencing procedure because, as the Court explained in *People v Whalen*,¹² procedural errors may render a sentence invalid:

A sentence within statutory limits may also be invalid on a number of grounds. It is invalid if the sentencing court relies on constitutionally impermissible considerations, such as the defendant's constitutionally infirm prior convictions, or improperly assumes a defendant's guilt of a charge which has not yet come to trial, or the court fails to exercise its discretion because it is laboring under a misconception of the law, or conforms the sentence to a local sentencing policy rather than imposing an individualized sentence. More recently, this Court has held invalid sentences which do not comply with essential procedural requirements such as failure to utilize a "reasonably updated" presentence report or to provide the defendant and his counsel with the opportunity to address the court before sentence is imposed.

⁹ E.g., *In re Callahan*, 348 Mich 77, 80; 81 NW2d 669 (1957); *In re Doelle*, 323 Mich 241, 245; 35 NW2d 251 (1948); *People v Harwood*, 286 Mich 96, 98; 281 NW 551 (1938); *People v Whitney*, 105 Mich 622, 627; 63 NW 765 (1895); *People v Smith*, 94 Mich 644, 646; 54 NW 487 (1893); *People v Morris*, 80 Mich 634, 641; 45 NW 591 (1890).

¹⁰ *People v Malkowski*, 385 Mich 244, 247-248; 188 NW2d 559 (1971); *People v Connor*, 348 Mich 456, 463; 83 NW2d 315 (1957); *People v Paton*, 284 Mich 427, 429; 279 NW 888 (1938); *Cummins v People*, 42 Mich 142, 144; 3 NW 305 (1879).

¹¹ See 5 LaFave, Israel & King, *Criminal Procedure* 2d, § 26.3(g), p 745.

¹² *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981) (citations omitted).

Despite that history, the Court had hinted that it might expand appellate review of sentencing.¹³ Broader review became reality in 1983. In *People v Coles*,¹⁴ the Court reasoned that it, as well as the Court of Appeals, had jurisdiction to review all sentencing issues because a sentence following a conviction is part of the final judgment in the case. The Court then was driven by policy considerations to exercise its power and review a trial court's discretionary decision to impose a sentence within statutory limits. The Court clearly stated the Michigan Constitution did not mandate that review:

We do not agree that the constitutionally guaranteed right of appeal mandates review of the trial court's exercise of discretion in sentencing in order to comport with due process of law. The expansion of the scope of appellate review of sentencing is a matter of public policy within this Court's power to adopt; it is not constitutionally required.¹⁵

On consideration of policy-based arguments, the Court held that an appellate court may afford relief to a defendant only if it finds that the trial court abused its discretion to the extent that it shocked the conscience of the court.¹⁶ The Court, however, cautioned that "[t]he scope of review may subsequently evolve, by means of case law or statutory enactment, into something more definite or even different from that which we announce today."¹⁷

Michigan courts utilized the *Coles* standard of review for seven years. During that period, this Court took steps to promote uniformity in sentencing and facilitate appellate review.

¹³ *People v Burton*, 396 Mich 238, 243; 240 NW2d 239 (1976).

¹⁴ *People v Coles*, 417 Mich 523, 433-535; 339 NW2d 440 (1983).

¹⁵ *Id.* at 542.

¹⁶ *Id.* at 550.

¹⁷ *Id.* at 549.

In 1984 and 1985, the Court issued administrative orders requiring that felony trial courts use the first edition of the Michigan Sentencing Guidelines¹⁸ when imposing a sentence.¹⁹ Those guidelines were, however, merely advisory. Under this Court's orders and the guidelines, a trial court could depart from the guidelines range. It only had to state reasons for the departure.²⁰

The trial court's authority to depart remained intact under the second edition of the Michigan Sentencing Guidelines. As with the first edition, the guidelines set forth in the second edition were merely advisory. In Administrative Order No. 1988-4, this Court stated that "[w]henever a judge of the circuit court or of the Recorder's Court for the City of Detroit determines that a minimum sentence outside the recommended minimum range should be imposed, the judge may do so. When such a sentence is imposed, the judge must explain on the sentencing information report and on the record the aspects of the case that have persuaded the judge to impose a sentence outside the recommended minimum range."

The next step in the evolution of appellate review of sentencing occurred two years later with this Court's decision in *People v Milbourn*.²¹ In *Milbourn*, the Court rejected the "shock the conscience" test in favor of the principle of proportionality, "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the

¹⁸ The guidelines were formulated by an advisory committee created by the Court. See Administrative Order No. 1983-3.

¹⁹ Administrative Order No. 1984-1; Administrative Order No. 1985-2.

²⁰ Michigan Sentencing Guidelines (1st ed.), Departure Policy.

²¹ *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

offense and the offender."²² The Court gleaned that principle from the legislative sentencing scheme, which provided the most severe punishments for those who commit the most serious crimes and subjected offenders with prior criminal records to harsher punishment than those with no criminal records.²³

Use of the sentencing guidelines remained a part of sentencing procedure after *Milbourn*. This Court viewed them as a useful tool in carrying out the legislative scheme, but did not require adherence to them because they did not have a legislative mandate.²⁴ Thus, a departure from the recommended sentencing range absent factors not adequately reflected in the guidelines range only alerted an appellate court to the *possibility* that the trial court violated the principle of proportionality. The ultimate test was whether the sentence was proportionate.

The *Milbourn* test, however, remained a creation of the judiciary, and, as such, could be altered by the Legislature. In 1994, the Legislature charted a path toward restricting both the trial court's exercise of its discretion in fashioning a sentence and the appellate courts' review of that exercise of discretion. 1994 PA 445 created a sentencing commission and authorized that commission to develop sentencing guidelines.²⁵ The act also established the standards for departing from those guidelines and appellate review of sentences imposed by trial courts.²⁶

²² *Id.* at 636.

²³ *Id.* at 650-654.

²⁴ *Id.* 656-658. The Court reenforced that point in *People v Mitchell*, 454 Mich 145, 173-178; 560 NW2d 600 (1997), and *People v Raby*, 456 Mich 487, 496-499; 572 NW2d 644 (1998).

²⁵ MCL 769.32; 1994 PA 445, § 33(1)(e).

²⁶ MCL 769.34(3), (10) & (11)

The Michigan Sentencing Guidelines Commission completed its assignment on December 2, 1997,²⁷ and the Legislature enacted its guidelines into law in 1998.²⁸ Those guidelines, not the judiciary's guidelines, apply to crimes committed on or after January 1, 1999.²⁹

Unlike the judiciary's guidelines, the statutory guidelines are mandatory. Under MCL 769.34(2), a trial court generally must impose a minimum sentence within the appropriate sentence range under the version of the sentencing guidelines in place on the date the defendant committed the crime. The court may only depart from the sentence range for substantial and compelling reasons. MCL 769.34(3) provides:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

²⁷ Michigan Sentencing Guidelines Commission, *Report of the Michigan Sentencing Guidelines Commission* (1997).

²⁸ 1998 PA 317.

²⁹ MCL 769.34(1)-(2).

The statute also addresses the scope of appellate review of a trial court's sentencing decision. MCL 769.34(10) directs that the Court of Appeals "shall affirm" a minimum sentence that is within the appropriate guidelines sentence range and "shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(11), in turn, addresses appellate review of a trial court's decision to depart from the sentence range. The statute provides:

If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

Construction of those statutory provisions is necessary to guide the courts of Michigan in sentencing matters. This case presents this Court with the opportunity to provide the lower courts with that needed direction.

2. Requirements Of The Trial Court When Departing From The Guidelines.

Under the plain language of MCL 769.34(3), a trial court must satisfy two requirements when departing from the sentence range established under the guidelines. First, the court must have "a substantial and compelling reason for that departure." Second, the court must state "on the record" the reasons for departure.

With regard to the first requirement, the Legislature set forth factors that a court could not use to justify a departure in MCL 769.34(3)(a).³⁰ The Legislature also imposed a more stringent standard if the reasons for departure involve an offense characteristic or offender characteristic

³⁰ The named factors are "gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, [and] religion"

already taken into account in determining the sentence range. The court may base a departure on such a characteristic only if the court finds from the facts contained in the record "that the characteristic has been given inadequate or disproportionate weight."³¹

Nonetheless, a trial court's identification of a permissible factor does not end the inquiry. Only "substantial and compelling" reasons may justify a departure. Yet, as this Court itself has acknowledged, the meaning of that phrase is hardly self-evident,³² and the Legislature did not elaborate the phrase's meaning in MCL 769.34.³³ The Legislature had, however, previously used the phrase in MCL 333.7401(4), which governs departures from the minimum sentences established by the Legislature for controlled substance offenses. At the time the Legislature enacted 1994 PA 445, the question of the appropriate construction of the statutory language "substantial and compelling" was pending before this Court in *People v Fields*.³⁴

In *Fields*, the Court reasoned:

Statutes should be interpreted according to the common and approved usage of any undefined words within them. [MCL 8.3a]. *Webster's New World Dictionary Third College Edition* defines "substantial," in relevant part, as, "2 real; actual; true; not imaginary 3 strong; solid; firm; stout 4 considerable; ample; large 5 of considerable worth or value; important. . . ." It defines "compelling," in relevant part, as, "irresistibly or keenly interesting, attractive, etc.; captivating"

³¹ MCL 769.34(3)(b).

³² *People v Daniel*, 462 Mich 1, 10; 609 NW2d 557 (2000).

³³ The phrase "substantial and compelling" was included in the original version of the house bill, HB 4782, introduced on May 13, 1993, and the Sentencing Guidelines Commission made no attempt to compile a list of substantial and compelling reasons for departure. *Report of the Michigan Sentencing Guidelines Commission*, p 7. The Legislature did not address the subject when it enacted the sentencing guidelines into law in 1998. See 1998 PA 317.

³⁴ *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995).

From these definitions it is evident that the words "substantial and compelling" constitute strong language. The Legislature did not wish that trial judges be able to deviate from the statutory minimum sentences for any reason. Instead, the reasons justifying departure should "keenly" or "irresistibly" grab our attention, and we should recognize them as being "of considerable worth" in deciding the length of a sentence.

* * *

In this context "substantial and compelling" cannot acquire a meaning that would allow trial judges to regularly use broad discretion to deviate from the statutory minimum. Such an interpretation would defeat the intent of the statute. Rather, it is reasonable to conclude that the Legislature intended "substantial and compelling reasons" to exist only in exceptional cases.^[35]

Further, to maintain the limited moderating effect intended by the Legislature, the Court concluded that only objective and verifiable factors may be considered in determining whether substantial and compelling reasons exist for a departure.³⁶

In *People v Babcock*,³⁷ the Court of Appeals adopted the *Fields* construction of the phrase "substantial and compelling" for purposes of MCL 769.34(11). That construction, which would also apply to subsection 3 of the statute, furthers the purposes of the statute by limiting the circumstances under which a trial court may depart from the applicable guidelines range. Historically, trial courts had wide discretion to choose a minimum sentence within the range

³⁵ *Id.* at 67-68

³⁶ *Id.* at 68-70. The Court reaffirmed that construction of "substantial and compelling" in *Daniel*, *supra* at 9-11.

³⁷ *People v Babcock*, 244 Mich App 64, 73-75; 624 NW2d 479 (2000) (hereafter referred to as *Babcock I*).

established by statute. In creating mandatory guidelines,³⁸ the Legislature clearly restricted the exercise of that discretion in an effort to reduce disparity in sentencing.³⁹

The Legislature nevertheless chose not to bar deviations from the applicable sentence range. Recognizing that the sentence range calculated under the guidelines may not accurately reflect the circumstances of a particular case, the Legislature allowed for possible departures. Departures, however, remain the exception. A broad construction of the phrase "substantial and compelling" would widen the exception and, contrary to the legislative purpose, increase the possibility of sentencing disparity. In contrast, the *Fields* construction of the phrase "substantial and compelling" best furthers the legislative purpose by providing for departures only under narrow circumstances.

That the trial court identifies a substantial and compelling reason for departing from the guidelines, however, does not give the court unfettered discretion to select any minimum term. MCL 769.34(3) provides that the trial court may depart if it has a "substantial and compelling reason for *that* departure." As this Court suggested in *People v Hegwood*,⁴⁰ the Legislature's use of the words "that departure" dictates that the substantial and compelling reasons must justify the

³⁸ See *People v Hegwood*, 465 Mich 432, 438-440; 636 NW2d 127 (2001).

³⁹ See 1994 PA 445, § 33(1)(e)(iv) (sentencing guidelines shall "[r]educe sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences"); see generally, House Legislative Analysis, HB 5419, May 12, 1998, pp 8-9 (attached as an appendix, 1b); House Legislative Analysis, HB 5419, September 23, 1998, pp 9-10 (attached as an appendix, 13b); Senate Fiscal Agency Analysis, HB 5419, October 23, 1998, p 11 (attached as an appendix, 25b).

⁴⁰ *Hegwood*, *supra* at 437, n 10.

particular departure in the case. A finding of a substantial and compelling reason, therefore, does not authorize a trial court to proceed as though no guidelines exist. The trial court may not consider all the circumstances of the offense and the offender and simply select a proportionate sentence in the *Milbourn* sense. The court instead must limit its consideration to the particular substantial and compelling reason(s) and determine an appropriate reduction or increase from the guidelines range justified by that reason(s).

Accordingly, under MCL 769.34(3), a trial court's sentencing decision involves a two-step inquiry. First, the court must determine whether substantial and compelling reasons for departing exist. If the court determines that they do not, it must select a minimum term of imprisonment from within the applicable guidelines range. Second, if the court finds that substantial and compelling reasons are present, it must state those reasons on the record and determine the degree of deviation from the outer limit of the guidelines range justified by those reasons. The court then imposes a sentence that includes that deviation.

3. Appellate Review Of Departures From The Applicable Guidelines Range.

Appellate review of a trial court's decision to depart from the sentencing guidelines likewise involves a multi-step inquiry. In *Babcock I*,⁴¹ the Court of Appeals concluded that the Legislature intended that appellate courts employ the standards of review enunciated by this Court in *Fields*. *Fields* adopted a three-part standard of review for departures from the mandatory minimum sentences for controlled substance offenses. Under *Fields*,⁴² an appellate

⁴¹ *Babcock I*, *supra* at 75-76.

⁴² *Fields*, *supra* at 77-78.

court reviews for clear error a trial court's determination that a particular factor existed. The court then reviews as a matter of law the trial court's determination that a particular factor was objective and verifiable. Finally, the court employs an abuse of discretion standard of review for the trial court's determination that the objective and verifiable factors constituted substantial and compelling reasons to depart.

On appeal after remand in *Babcock*, a different panel of the Court of Appeals questioned the application of the *Fields* abuse of discretion standard because the statute suggests de novo review.⁴³ As that panel observed, *Babcock I* failed to recognize the important distinction between the issue in *Fields* and the scope of review of departures from the statutory sentencing guidelines. When this Court decided *Fields*, no statute addressed the scope of appellate review of departures from the mandatory minimum sentences. The Court therefore adopted standards reflecting the nature of the particular determinations involved. Unlike the statutes at issue in *Fields*, however, MCL 769.34 does address appellate review of departures from the sentencing guidelines. Thus, the scope of appellate review question is now one of statutory construction and *Fields* is not controlling.

Under the plain language of MCL 769.34(11), an appellate court does not grant deference to a trial court's determination that its reason for departing from the sentence range was a substantial and compelling one. Rather, the appellate court reviews the record and reverses if it "finds" that "the trial court did not have a substantial and compelling reason for departing from

⁴³ *People v Babcock (After Remand)*, 250 Mich App 463, 467, n 3; 648 NW2d 221 (2002) (hereafter referred to as *Babcock II*).

the appropriate sentence range" ⁴⁴ While that review appears somewhat akin to a de novo review, the clear language of the statute does not authorize consideration of reasons rejected or not considered by the trial court. The court's inquiry is limited to the *trial court's* reasons for departing, with proper deference to the trial court's findings of fact. ⁴⁵

The determination that the trial court had "a" substantial and compelling reason for departing does not, however, end the appellate inquiry. Subsection 11 only addresses the appellate court's action under one circumstance. Through the use of the mandatory language "shall," the Legislature directed that the appellate court remand for resentencing when it finds that *all* of the trial court's reasons were not substantial and compelling. The statutory provision simply does not address the appellate court's action when the trial court identified more than one reason for departing and the appellate court finds that some are not substantial and compelling. ⁴⁶ Nor does the provision address appellate review of the degree of the departure. By its terms, it only addresses review of the trial court's reasons "for departing," not the actual "departure."

Babcock I incorrectly inferred from the language of subsection 11 that the Legislature has foreclosed appellate review of the degree of departure. In so concluding, the Court failed to construe the act as a whole to harmonize its provisions and carry out the purpose of the

⁴⁴ MCL 769.34(11).

⁴⁵ Because the trial court is in a superior position to evaluate witness credibility, the appellate court grants deference to the court's factual findings by reviewing them for clear error. See MCR 2.613(C).

⁴⁶ Under those circumstances, the appellate court should remand for resentencing unless the record reveals that the trial court would have imposed the same sentence had it not relied on the erroneous reason. See *Fields, supra* at 80; cf. *Williams v United States*, 503 US 193, 203; 112 S Ct 1112; 117 L Ed 2d 341 (1992).

Legislature.⁴⁷ When read as a whole, MCL 769.34 does not reveal a legislative intent that appellate courts limit their review to only the reasons for departing, and never review the degree of departure.

If the Legislature had intended to foreclose appellate review of the degree of departure, it would have crafted a statutory provision akin to MCL 769.34(10).⁴⁸ Subsection 10 directs that the appellate court "shall affirm" a minimum sentence "within the appropriate guidelines sentence range" and "not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." The Legislature did not similarly address the circumstances under which an appellate court "shall affirm" a departure from the guidelines range. Instead, in subsection 11, the Legislature addressed one circumstance in which the appellate court "shall remand" for resentencing. In light of the clear language of subsection 10, therefore, it is unreasonable to construe subsection 11 as foreclosing appellate review of the degree of departure.

That conclusion is reinforced by the language of MCL 769.34(7) and MCL 769.34(3). In MCL 769.34(7), the Legislature mandated that a trial court give particular advice regarding a defendant's appellate rights when it has imposed a minimum sentence longer or more severe than the guidelines range. A trial court must advise the defendant that "he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate

⁴⁷ *Murphy, supra* at 159.

⁴⁸ The Legislature also could have provided that review was "limited to" particular inquiries. Compare Kan Stat Ann § 21-4721(d); Or Rev Stat § 138.22(3).

sentence range." That reference to the length of the sentence clearly signals that the scope of appellate review extends beyond the trial court's reasons for departing from the guidelines range.

MCL 769.34(3) likewise does not signal an intent to foreclose appellate review of the degree of departure. In *Hegwood*,⁴⁹ this Court explained:

[W]e observe that the statute provides, "A court may depart from the appropriate sentence range established under the [guidelines] if the court has a substantial and compelling reason for *that* departure" (Emphasis supplied.) MCL 769.34(3). In light of such language, we do not believe that the Legislature intended, in every case in which a minimum upward or downward departure is justified by "substantial and compelling" circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the "substantial and compelling" circumstances articulated by the court must justify the *particular* departure in a case, i.e., "that departure."

That a trial court's discretion in determining the degree of departure is not unfettered, however, does not suggest that appellate courts may merely second-guess the trial court's determination in that regard. Under the statutory framework, the authority to sentence and the discretion to depart from the guidelines remain with the trial court.⁵⁰ The appellate court therefore must give deference to the trial court's determination regarding departure length.

In determining what deference is due, the Court should give considerable weight to the special competence of trial courts in sentencing matters. Trial courts have experience in calculating appropriate sentences under the guidelines. That experience is essential when translating a particular reason for departure into a period of incarceration because the guidelines represent the Legislature's determinations regarding appropriate sentences when combinations of

⁴⁹ *Hegwood*, *supra* at 437, n 10.

⁵⁰ MCL 769.1(1); MCL 769.34(2)-(3).

factors are present. Only through the repeated use of those guidelines in varied factual circumstances can one begin to quantify particular sentencing factors.

Trial courts also have an institutional advantage over appellate courts in sentencing matters because appellate courts review only a fraction of sentencing guidelines cases. In contrast to a trial court that imposes a sentence for all criminal convictions, an appellate court reviews a criminal case *only* if a party invokes that court's jurisdiction. Further, only a portion of those criminal cases on appeal involve sentencing issues. Moreover, even where a sentencing issue is raised, appellate courts are limited to reviewing only preserved scoring errors and information accuracy when the trial court has stayed within the guidelines.⁵¹ Thus, it is only in a tiny fraction of criminal cases that appellate courts engage in any review of sentencing guidelines departures.

Given the institutional advantage possessed by trial courts, appellate courts should grant substantial deference to a trial court's determination of the extent of the departure from the guidelines. That determination, which affects the minimum term of imprisonment, involves a traditional exercise of discretion by the trial court. Indeed, in *Coles*,⁵² this Court observed that "[i]ndeterminate sentencing, by its very nature, requires the trial court to exercise a *certain degree of discretion* in the imposition of a sentence. . . . The judicial power to *exercise discretion* in imposition of sentences is thus an integral part of the legislative scheme of

⁵¹ MCL 769.34(10).

⁵² *Coles*, *supra* at 539 (emphasis added).

indeterminate sentencing" An appellate court therefore should review the extent of a departure from the guidelines for an abuse of discretion.⁵³

That review is not, as defendant suggests, a review for proportionality under *Milbourn*. The Legislature could have, but did not, provide for appellate review of overall sentence length.⁵⁴ Under the statute, an appellate court may not review the trial court's exercise of discretion in choosing a sentence within the appropriate guidelines range.⁵⁵ Moreover, just as a trial court's finding of a reason to depart from the sentence range does not authorize the reweighing of all the factors involved in sentencing, an appellate court's review of a departure does not involve reweighing those same factors. Because the *Milbourn* review would require that the appellate

⁵³ What constitutes an abuse of discretion is open to debate. This Court has stated that an abuse of discretion occurs when the trial court's decision is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion.'" *People v Lett*, 466 Mich 206, 220, n 12; 644 NW2d 743 (2002), quoting *Spaulding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). The Court of Appeals, in contrast, has described the standard as one where an abuse occurs only when an unprejudiced person, considering the facts on which the trial court acted, would say that no justification or excuse for the ruling existed. E.g. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). Meanwhile, the Sixth Circuit Court of Appeals discerns an abuse of discretion where it is "left with a definite and firm conviction that the court below committed a clear error of judgment." *United States v Chance*, 306 F3d 356, 393 (CA 6, 2002). While that standard may require clarification, the determination of an abuse of discretion in departing from the guidelines under the People's approach does not turn on a particular characterization of that standard.

⁵⁴ Compare 18 USC 3742(d)(3) (authorizing appellate courts to review a sentence outside the guidelines range to determine whether it is "unreasonable"); Wash Rev Code § 9.94A.585(4) (allowing the appellate court to reverse a sentence outside the range if it is "clearly excessive or clearly too lenient").

⁵⁵ MCL 769.34(10).

court weigh all sentencing factors, it clearly did not survive enactment of MCL 769.34.⁵⁶

Consistent with the language of MCL 769.34(3), the appellate court simply must review the degree of departure for an abuse of discretion.

When undertaking that review, the appellate court should look to the sentencing guidelines because those guidelines translate the presence of particular factors into sentence ranges. The Seventh Circuit Court of Appeals and other federal courts use a similar approach when evaluating the reasonableness of a departure from the federal sentencing guidelines.⁵⁷ In *United States v Leahy*,⁵⁸ the Seventh Circuit explained:

No rigid rule exists for computing an upward departure. The law merely requires that district judges link the degree of departure to the structure of the Guidelines and justify the extent of the departure taken. To make its assessment, the district judge need only draw an analogy between the defendant's actions and conduct discussed in the guidelines.

Following that approach in cases involving an upward departure, appellate courts in Michigan should, if possible, equate the trial court's reasons for departing to existing offense and prior record variables. The sentencing guidelines then will guide the court in determining the extent of the departure justified by the trial court's reasons. If assessing points under those

⁵⁶ Proportionality review is not entirely irrelevant. To the extent that a determination that a sentence is disproportionate amounts to a determination that no reasons, let alone those stated by the trial court, could justify the degree of departure selected by the trial court, an appellate court would find an abuse of discretion. A determination that a sentence is proportionate, on the other hand, would not end the inquiry because the particular reasons for departing from the statutory guidelines must justify the extent of the departure.

⁵⁷ See *United States v Horton*, 98 F3d 313, 317 (CA 7, 1996) (cases collected).

⁵⁸ *United States v Leahy*, 169 F3d 433, 445 (CA 7, 1999), quoting *United States v Scott*, 145 F3d 878, 886 (CA 7, 1998).

comparable variables would alter the offense variable or prior record variable level, the sentence grid will provide a different minimum sentence range. An appropriate departure is reflected in that range, and if the sentence imposed falls within it, the extent of the departure is justified. The trial court has not abused its discretion, and the appellate court must affirm that sentence.

4. Review By The Michigan Supreme Court.

In its order granting defendant's application for leave to appeal in this case, the Court directed the parties to address, among other issues, "the standard of appellate review of the Court of Appeals in light of MCL 769.34(11)" and "the standard of review for this Court." The People contend that the respective courts undertake the same review. Although MCL 769.34(10) and MCL 769.34(11) reference the "court of appeals" when setting forth part of the scope of review of sentencing decisions, this Court should not infer an intent to preclude Supreme Court review from those references. Properly read, the references to the "court of appeals" merely signal the Legislature's recognition that the Court of Appeals has jurisdiction over a party's initial appeal.⁵⁹

The above conclusion finds support in *Coles*. In *Coles*,⁶⁰ this Court determined that both it and the Court of Appeals have jurisdiction over appeals from final judgments of the trial courts and that a judgment following conviction in a criminal case includes the sentence. Once this Court's jurisdiction is invoked, it may undertake the same review as the Court of Appeals because it may "enter any judgment or order that ought to have been entered, and enter other and

⁵⁹ MCL 600.308.

⁶⁰ *Coles*, *supra* at 533-536.

further orders and grant relief as the case may require."⁶¹ Absent an express statement by the Legislature that the Supreme Court may not review a trial court's departure from the appropriate sentence range, the Court should exercise that authority. Because the references to the "court of appeals" in MCL 769.34 are not such an express statement, this Court should review a trial court's sentencing decisions under the statutory sentencing guidelines and apply the same standards of review as the Court of Appeals.

C. Review Of The Trial Court's Decision To Depart In Aliakbar.

In this case, defendant was convicted of the offense of burning of a dwelling house, which is punishable by imprisonment for not more than 20 years.⁶² Although the longest possible sentence for the offense was 160 to 240 months,⁶³ the range for defendant's minimum sentence established under the statutory guidelines was 15 to 25 months. 54a. The minimum term imposed by the trial court (7½ years or 90 months) exceeded the upper limit of that range by 65 months. The Court of Appeals reached the correct result in affirming that sentence because the trial court had a substantial and compelling reason for departing from the guidelines and did not abuse its discretion in selecting the degree of departure.

1. The Trial Court Stated Its Reasons For The Departure.

The trial court, in compliance with MCL 769.34(3), explained its reasons for its departure from the sentence range as follows:

⁶¹ MCR 7.316(A)(7).

⁶² MCL 750.72.

⁶³ MCL 769.34(2)(b) (minimum sentence may not exceed 2/3 of statutory maximum).

Well, this Court knows, after many, many cases of tragedies that have resulted from impulsive acts such as sitting (sic) fires and throwing Molotov Cocktails, which would have resulted in the death of your entire family.

In fact, again, the witness was your mother, and your brother. And I know this is no laughing matter. It's no matter that, as suggested by the Sentencing Guidelines, is something slight and can be overlooked.

The Court has heard the testimony in this case. And I've heard the statements by your mother at the trial, and your brother.

The Court rejects the Sentencing Guidelines, because it does not truly reflect the gravity of this offense. And the exposure to danger that these people have been put through, and the fact that they're living in fear of this matter continuing, the Court is going to reject the Sentencing Guidelines.

I will not follow what I think is absurd in these cases for someone who hasn't heard this case, does not know the gravity of the offense, to make a suggestion to the Court about what the sentence should be.

Seven and a half to 20. Also, it should be noted on the record that you did enter a plea before another judge. The judge permitted you to withdraw that plea. So, you're (sic) statement of innocence (sic).

40a-41a.

The trial court did not, as defendant argues, reject the sentencing guidelines in general.

The court's remarks are unlike the *Hegwood* trial court's remarks, which demonstrated that court's misunderstanding of the respective roles of the separate branches of government. In *Hegwood*,⁶⁴ the trial court stated that it "could care less what the legislature through its rule making authority says as to the guidelines that I could impose, or what kind of sentence I would impose" and suggested that it had the authority to fix the sentence because it is part of a separate branch of government. Here, in contrast, the court did not question the Legislature's authority to

⁶⁴ *Hegwood, supra* at 435-436.

establish the guidelines and its remarks, which occurred after it stated its reasons why it chose to depart, do not suggest a wholesale rejection of the guidelines. The court considered the sentence range established under the guidelines for this case,⁶⁵ but rejected that range as not accurately reflecting the serious circumstances of this case. In stating its reasons for departure, the trial court complied with MCL 769.34(3).⁶⁶

2. The Trial Court Had A Substantial And Compelling Reason For Departing From The Guidelines Range.

A review of the record reveals that the trial court had a substantial and compelling reason for departing from the sentence range under the guidelines. The trial court stated its reasons for departing moments after defendant's mother spoke at sentencing, and emphasized the mother's testimony in its opening remarks. 40a-41a. The statement by defendant's mother thus provides important context for the trial court's statement of reasons for departing from the guidelines range.

Defendant's mother informed the trial court at the sentencing hearing that her family had lived in fear because of defendant's repeated criminal acts over a nine-month period. 35a-37a. Defendant's first acts in the criminal pattern against his family included breaking windows on the family van--twice. Two days after the van was repaired, the family saw defendant prowling around the house during the early morning hours. Afraid, they kept vigil until the sun arose. Striking fear in his family did not satisfy defendant, however. He returned during the next month

⁶⁵ The court signed the Sentencing Information Report. 54a.

⁶⁶ If this Court determines that an additional explanation of reasons is necessary to facilitate appellate review, it may remand the case to the trial court to more fully explain its reasons. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989).

and again broke the windshield of one of the family cars. Then, five months later, defendant escalated the violence and placed the lives of his family in danger by attempting to burn the family home. Though the danger was great, the family avoided serious harm because one of their home's windows withstood the impact of a Molotov Cocktail. The family then tried to protect themselves, but to no avail. Two months later, defendant threw another Molotov Cocktail at the house. Only after defendant's arrest for that crime did the family sleep soundly.

When read in light of the remarks of defendant's mother, the trial court's statement that the guidelines did not reflect the gravity of the offense, the danger to which defendant's family was exposed, and the family's fear, amounted to a determination that the instant offense was the culmination of a pattern of criminal activity by defendant against his family that placed them in danger. The trial court appropriately considered the uncharged criminal acts because they were proven by a preponderance of the evidence (the statement of defendant's mother) and defendant had an opportunity to refute the allegations during allocution.⁶⁷

Moreover, contrary to defendant's argument, the trial court did not have to make an additional finding regarding that aggravating factor. MCL 769.34(3)(b) requires a finding that an offense characteristic has been given inadequate or disproportionate weight only when the characteristic has been already taken into account in determining the sentence range guidelines. Here, the guidelines range never took into account the factor identified by the trial court. Defendant received 5 points for PRV 6 (relationship to the criminal justice system) and 15 points

⁶⁷ See *People v Hampton*, 176 Mich App 383, 385-386; 439 NW2d 365 (1989); see also *United States v Watts*, 519 US 148, 151-152; 117 S Ct 633; 136 L Ed 2d 554 (1997); *People v Ewing (After Remand)*, 435 Mich 443, 446, 473; 458 NW2d 880 (1990).

for OV 2 (lethal potential of the weapon possessed).⁶⁸ Those variables accounted for defendant's prior contact with the criminal justice system and his possession of Molotov Cocktail during the offense. They did not take into account defendant's repeated criminal acts against his family, which did not result in convictions.⁶⁹

The record thus reveals that the trial court had a substantial and compelling reason for departing from the sentencing guidelines range. That defendant engaged in repeated criminal acts against his family is both objective and verifiable. It is a factor that keenly or irresistibly grabs one's attention because it shows that defendant's burning of his family's house was not an isolated criminal act against his family and that the instant offense was far more serious than viewing it in isolation suggests. That factor, which bears on the seriousness of both the offense and the offender, is of considerable worth in deciding the length of a sentence. Accordingly, the trial court had a substantial and compelling reason for departing from the guidelines range.

3. The Trial Court Did Not Abuse Its Discretion In Departing From The Guidelines Range By 65 Months.

The trial court did not abuse its discretion in departing from the guidelines by 65 months because of defendant's repeated criminal acts against his family. PRV 5, OV 7, and OV 13 are comparable variables under the guidelines:

⁶⁸ See Sentencing Information Report. 54a. Defendant may not raise an issue challenging the scoring to the guidelines because he did not raise the issue below. MCL 769.34(10).

⁶⁹ Defendant erroneously asserts that he received 5 points under PRV 6 for "malicious destruction of the van." Def.'s Br. at 15. The PSIR lists an offense date of December 29, 1998, for defendant's misdemeanor conviction. 45a. Defendant's mother did not mention any crimes during that month. 37a-39a.

- Under PRV 5, ten points are assessed if the defendant has three or four prior misdemeanor convictions.⁷⁰ Here, defendant's mother described four prior criminal acts that were at least misdemeanors—three separate window-breaking incidents and one prior attempted firebombing.
- Under OV 7, fifty points are assessed if a victim was treated with "terrorism," i.e., "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."⁷¹ Here, defendant's conduct over several months, when viewed objectively, surely was designed to substantially increase the fear and anxiety his family suffered.
- Under OV 13,⁷² ten points are assessed if the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property. Here, while some of defendant's crimes may not have been felonious, the instant crime was clearly part of a pattern of criminal activity involving three or more crimes.

The addition of those points to the points already assessed in calculating the guidelines in this case generates a total of 15 points for prior record variables and 75 points for offense variables. The resulting guidelines range (PRV level C, OV level VI) is 57 to 95 months.⁷³ The minimum sentence imposed by the trial court fell within that range. Accordingly, the trial court did not abuse its discretion in departing from the guidelines range by 65 months.

⁷⁰ MCL 777.55(1)(c).

⁷¹ MCL 777.37.

⁷² MCL 777.43(1)(c).

⁷³ MCL 777.63.


RELIEF

WHEREFORE, the People request that this Court affirm the judgment of the Court of Appeals affirming defendant's conviction and sentence.

Respectfully Submitted,

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